

Are the Judges on the Board of Patent Appeals Properly Appointed?

John Duffy, a constitutional law professor at the George Washington University, has written an article explaining that the US Constitution requires that “inferior officers” of the United States government be appointed by heads of departments. The article, originally published on the Patently-O blog, is now available at the website of the Social Science Research Network. An NPR interview with Professor Duffy provides further insight into his research. The problem involves the “Appointments Clause” of the Constitution, Art. II, 2, cl. 2, which says:

“He [the President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”

The Supreme Court considered a similar situation in *Freytag v. Commissioner*, 501 US 868 (1991). There, the appointment of judges to the Tax Court by the Chief Judge of the Tax Court was challenged. The Supreme Court had little trouble concluding that the judges were “inferior officers” as that term is used in the Appointments Clause.

In considering whether the appointment had been made by a “head of department”, the Court said that this was not the case because that term refers only to a Cabinet-level officer. However, the appointment was upheld as having been made by a “Court of Law”, i.e., the Tax Court, an Article I court.

In 2000, Congress adopted a statute authorizing the director of the PTO to appoint judges to the Board of Patent Appeals and Interferences. The legislation was incorporated by reference into a funding bill for the District of Columbia, and may not have received the scrutiny normally accorded such bills. In any event, the analysis in *Freytag* strongly suggests that the judges on the Board of Patent Appeals and Interferences are inferior officers, and that director of the PTO is not the head of a department. It is hard to imagine that he or his agency might be deemed to be a “Court of Law”. From this, Professor Duffy argues that the judges appointed by the director of the PTO have been invalidly appointed, potentially invalidating all of their decisions.

This argument has now been made in an appeal to the Supreme Court to which the Court has not yet granted certiorari. *Translogic Technology v. Dudas*, No. 07-1303. This situation bears close watching, since it may invalidate many rulings previous made by the Board. ✧